Lee Gee Yoong v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–489 OF 2010
ABU SAMAH, ABDUL WAHAB PATAIL AND LINTON ALBERT JJCA
18 DECEMBER 2012

Criminal Procedure — Appeal — Conviction and sentence, against — Trial judge's findings — Trafficking in 4.35g Nimetazepam — Arrest conducted with aid of agent provocateur and informant — Whether prima facie case established — Whether defence raised reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a)

Evidence — Adverse inference — Failure to call material witness — Whether adverse inference could be drawn — Evidence Act 1950 s 114(g)

The appellant was convicted and sentenced for trafficking in 4.35g Nimetazepam, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). An agent provocateur ('SP3') was informed by an informant that one Ah Boy had a supply of the drug and was looking for a buyer. SP3 called the number given to him by the informant, made the necessary arrangements and laid an ambush plan. SP3 and Ah Boy communicated via telephone and the latter informed the former that he would arrive in a black Proton Wira. SP3 gave the appellant his car number and waited until a black Proton Wira with three Chinese males inside, stopped alongside SP3's car. The driver was holding a handphone and at that moment, SP3's handphone rang. The caller identified himself as Ah Boy and instructed SP3 to follow his car of which SP3 obliged for about 100 meters before Ah Boy stopped by the roadside. SP3 stopped behind him. Ah Boy came out of his car with a white plastic bag ('P11'), and sat beside SP3 in the latter's car. At that moment, the ambush party sprung into action and arrested all three Chinese men. SP4 conducted a body search on the appellant and found on him a sling bag ('P18') containing a wallet ('P19') with an identity card identifying him as the appellant. The sling bag also contained two Nokia handphones and one Motorola handphone. Nothing was found on the other two Chinese identified as Yeo Kah Fan and Kam Mun Loong or in the vehicle. The white plastic bag was found to contain pills weighing 165.50g and were found to contain 4.35g nimetazepam. At the end of the prosecution case, the High Court found that the prosecution had made out a prima facie case against the appellant and the appellant was called to enter defence. The appellant testified that the vehicle belonged to his wife and that he often goes to work with the car. It was his contention that together with Yeo Kah Fan and Kam Mun Loong, they had gone to a used car shop where Yeo Kah Fan had

asked him to take him to meet a friend at a petrol station. On the way, Yeo Kah Fan called his friend and told the appellant to stop his car next to a gold coloured Gen2 car. The appellant's furhter submitted that he did not know what was in the bag P11. It was submitted he did not have it long enough to find out. When he reached the Gen2, he was asked to enter the car to sit by the driver who was still talking on the telephone. Then suddenly someone came, opened the car door, pointed a gun at him and told him to lie face down on the road.

Held, dismissing the appeal and affirming the conviction and sentence of court below:

(1) Because the arrangement to meet made between SP3 and Ah Boy on the telephone did take place as arranged, and together with the evidence that the telephone was found in the appellant's sling bag, the prosecution had made out a prima facie case that the appellant was the Ah Boy in the telephone transaction for the sale and delivery of the pills made with SP3. The evidence of SP6 which remained unshaken, that the telephone with the number 016-6228961 was used in calls between SP3 and the appellant, further supported the conclusion (see para 17).

(2) The learned trial judge did not overlook the fact although the agreed transaction was for 1,000 pills, what was found in the bag taken from the appellant contained 970 pills. There was no flaw in the reasoning that this did not throw a reasonable doubt whether the appellant was the Ah Boy with whom the sale and purchase transaction was made (see para 18).

(3) The learned trial judge had directed his mind to the question he must address, that was whether the defence had raised a reasonable doubt, and to do so by measuring it against the whole of the evidence put before the court (see para 22).

(4) The effect of the defence evidence was that the sale and purchase transaction was between SP3 and Yeo Kah Fan and not the appellant, and that Yeo Kah Fan was in fact Ah Boy. The learned judge did not err in finding that this defence was never put to any prosecution witness. All that was done was to put to SP3 and SP4 that the appellant was not Ah Boy. It was not put to SP3 and SP4 or even SP5 that at any time the appellant had told any of them that the exhibit drugs did not belong to him but to Yeo Kah Fan. If these prosecution witnesses were so told during investigation, the investigation could have been directed to Yeo Kah Fan or if the questions were put in cross-examination of SP3, SP4 or SP5, the prosecution could have called Yeo Kah Fan as a witness. Since the allegation against Yeo Kah Fan was not made to any prosecution witness, no adverse inference could be drawn by/from the not calling of

either Yeo Kah Fan or Kam Mun Loong or both as a witness. These two friends were offered to the appellant who elected not to call them as witnesses (see para 23).

(5) The defence that Yeo Kah Fan was Ah Boy and that it was he who spoke with SP3 over the telephone was incapable of raising a reasonable doubt in the prosecution case for another reason: the testimony by SP3 that he saw the appellant speaking to him over the telephone while sitting in the driver's seat was never challenged. SP3 could not receive another call from another person on his telephone while the appellant was on the line, and at the same time he saw the appellant speaking to him (see para 24).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum kerana mengedar 4.35g Nimetazepam, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya ('ADB'). Seorang ejen perangkap ('SP3') diberitahu oleh pemberi maklumat bahawa seorang yang bernama Ah Boy mempunyai bekalan dadah dan sedang mencari pembeli. SP3 menghubungi nombor yang diberikan kepadanya oleh pemberi maklumat, membuat pengaturan yang perlu dan membuat pelan serang hendap. SP3 dan Ah Boy berhubung melalui telefon dan Ah Boy memberitahu SP3 bahawa dia akan tiba dalam kereta Proton Wira berwarna hitam. SP3 memberikan perayu nombor keretanya dan menunggu sehingga sebuah kereta Proton Wira hitam dengan tiga lelaki Cina di dalamnya, berhenti di sebelah kereta SP3. Pemandu kereta tersebut memegang telefon bimbit dan pada ketika itu, telefon bimbit SP3 berbunyi. Pemanggil tersebut memperkenalkan dirinya sebagai Ah Boy dan mengarahkan SP3 mengikuti keretanya yang mana SP3 ikuti lebih kurang 100 meter sebelum Ah Boy berhenti di tepi jalan. SP3 berhenti di belakangnya. Ah Boy keluar dari keretanya dengan sebuah beg plastik putih ('P11'), dan duduk di sebelah SP3 di dalam kereta SP3. Pada ketika itu, pasukan serang hendap menyerang dan menangkap ketiga-tiga lelaki Cina tersebut. SP4 melakukan carian badan ke atas perayu dan menemui sebuah beg galas ('18') yang di dalamnya mengandungi dompet ('P19') dengan kad pengenalan yang mengecamnya sebagai perayu. Beg galas tersebut juga mengandungi dua telefon bimbit Nokia dan satu telefon bimbit Motorola. Tiada apa-apa ditemui pada dua lelaki Cina lain yang dikenali sebagai Yeo Kah Fan dan Kam Mun Loong atau di dalam kenderaan tersebut. Beg plastik putih tersebut didapati mengandungi pil yang beratnya 165.50g dan didapati mengandungi 4.35g nimetazepam. Di akhir kes pendakwaan, Mahkamah Tinggi mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu dan perayu dipanggil membela diri. Perayu memberikan keterangan bahawa kenderaan tersebut kepunyaan isterinya dan bahawa dia selalu pergi kerja dengan kereta tersebut. Dia selanjutnya menghujah bahawa bersama-sama dengan Yeo Kah Fan dan Kam Mun Loong, mereka telah pergi ke kedai kereta guna di mana Yeo Kah Fan telah bertanya kepadanya untuk membawanya berjumpa seorang kawan di stesen minyak. Dalam perjalanan,

Yeo Kah Fan telah menghubungi kawannya dan menyuruh perayu memberhentikan keretanya di sebelah kereta Gen2 berwarna emas. Perayu selanjutnya menghujah bahawa dia tidak tahu apa yang terdapat di dalam beg P11. Dihujahkan bahawa dia tidak mempunyai masa yang lama untuk mengetahuinya. Apabila dia sampai ke Gen2 tersebut, dia disuruh memasuki kereta tersebut untuk duduk di sebelah pemandu yang masih bercakap dalam telefon. Kemudian seseorang tiba-tiba datang, membuka pintu kereta, mengarahkan pistol kepadanya dan menyuruhnya meniarap di atas jalan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman mahkamah bawahan:

(1) Oleh sebab pengaturan untuk bertemu dibuat antara SP3 dan Ah Boy melalui telefon tidak berjalan seperti yang diatur, dan bersama-sama dengan keterangan bahawa telefon dijumpai di dalam beg galas perayu, pihak pendakwaan telah membuktikan kes prima facie bahawa perayu adalah Ah Boy dalam transaksi telefon untuk penjualan dan penghantaran pil-pil yang dibuat dengan SP3. Keterangan SP6 yang kekal tidak digugat, bahawa telefon bernombor 016-6228961 digunakan dalam panggilan-panggilan antara SP3 dan perayu, selanjutnya menyokong kesimpulan tersebut (lihat perenggan 17).

(2) Hakim perbicaraan yang bijaksana tidak terlepas perhatian tentang fakta bahawa walaupun transaksi yang dipersetujui adalah untuk 1,000 pil, apa yang dijumpai di dalam beg yang diambil daripada perayu mengandungi 970 pil. Tidak ada kecacatan dalam alasan bahawa ini tidak menunjukkan keraguan munasabah sama ada perayu adalah Ah Boy yang dengannya transaksi jual beli tersebut dibuat (lihat perenggan 18).

(3) Hakim perbicaraan yang bijaksana telah mengarahkan mindanya kepada persoalan yang dia perlu selesaikan, iaitu sama ada pihak pembelaan telah membangkitkan keraguan munasabah, dan untuk berbuat demikian dengan membuat penilaian terhadap kesemua keterangan yang dikemukakan di mahkamah (lihat perenggan 22).

(4) Kesan keterangan pembelaan adalah bahawa transaksi jual beli dadah adalah antara SP3 dan Yeo Kah Fan dan bukan perayu, dan bahawa Yeo Kah Fan adalah sebenarnya Ah Boy. Hakim yang bijaksana tidak terkhilaf dalam penemuan bahawa pembelaan ini tidak pernah dikemukakan kepada mana-mana saksi pihak pendakwaan. Apa yang dilakukan adalah mengemukakan kepada SP3 dan SP4 bahawa perayu bukanlah Ah Boy. Ia tidak ditanya kepada SP3 dan SP4 mahupun SP5 pada bila-bila masa sama ada perayu telah memberitahu kepada mereka bahawa ekshibit dadah tersebut bukan kepunyaannya tetapi kepunyaan Yeo Kah Fan. Jika saksi-saksi pendakwaan ini diberitahu sedemikian semasa siasatan dilakukan, siasatan tersebut mungkin boleh diarahkan terhadap Yeo Kah Fan atau jika persoalan tersebut dinyatakan dalam pemeriksaan balas

SP3, SP4 atau SP5, pihak pendakwaan mungkin boleh memanggil Yeo Kah Fan sebagai saksi. Oleh sebab dakwaan terhadap Yeo Kah Fan tidak dibuat kepada mana-mana saksi pendakwaan, tidak ada inferens bertentangan yang boleh dibuat daripada tidak memanggil sama ada Yeo Kah Fan atau Kam Mun Loong atau kedua-duanya sebagai saksi. Kedua-dua rakan telah ditawarkan kepada perayu yang memilih untuk tidak memanggil mereka sebagai saksi (lihat perenggan 23).

(5) Pembelaan bahawa Yeo Kah Fan adalah Ah Boy dan bahawa adalah dia yang bercakap dengan SP3 melalui telefon tidak berupaya membangkitkan keraguan munasabah kepada kes pihak pendakwaan disebabkan satu lagi alasan: keterangan SP3 bahawa dia melihat perayu bercakap dengannya melalui telefon semasa sedang duduk di tempat duduk pemandu, tidak pernah dicabar. SP3 tidak boleh menerima satu lagi panggilan daripada seorang yang lain ke telefonnya semasa perayu sedang bercakap dengannya melalui telefon tersebut, dan pada masa yang sama dia nampak perayu bercakap dengannya (lihat perenggan 24).]

Notes

For cases on conviction and sentence against, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 324–370.
For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 211–231.

Cases referred to

PP v Md Rashid & Anor [1997] 1 CLJ 235, FC (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141; [2010] 4 CLJ 529, FC (refd)

Legislation referred to

Criminal Procedure Code s 180(1), (3)
Dangerous Drugs Act 1952 ss 39B(1)(a), 40A

Appeal from: Criminal Trial No 45A-33 of 2009 (High Court, Shah Alam)

Amy Law (appointed by the court) for the appellant.
Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Lee Gee Yong was charged, tried, convicted and sentenced in trafficking of 4.35g nimetazepam under s 39B(1)(a) of the Dangerous Drugs Act 1952 as follows:

Bahawa kamu pada 21 Februari 2009, jam lebih kurang 5:00 petang, di tepi Jalan Cheras - Kajang berhampiran Kern PGA, Batu 7 Cheras, di dalam daerah Hulu Langat di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu 4.35 gram Nimetazepam dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

PROSECUTION CASE

[2] This is a case where an agent provocateur SP3 met on 20 February 2009 at about 8pm with an informant who told him that one Ah Boy who had a substantial supply of the drug eramin 5 had asked him to find a buyer. SP3 had called the No 016-6228961 given to him by the informant to contact Ah Boy. Ah Boy confirmed he had the supply and could supply 1,000 pills for RM5,000. Upon bargaining this was reduced to RM4,800. They scheduled delivery and payment the next day on 21 February 2009 at 4pm at the Petronas Petrol Station at Jalan Cheras.

[3] The next morning at about 9pm, SP3 told SP4 about the transaction. An ambush was laid by SP4. SP3 arrived at the petrol station at about 3.45pm and waited. At about 4.15pm, he received a telephone call from Ah Boy that he would arrive in a black Proton Wira number 4022 in about five minutes. SP3 gave him his car number and waited. At about 5pm, a black Proton Wira with three Chinese males stopped alongside SP3's car. The driver was holding a handphone and at that moment SP3's handphone rang. The caller identified himself as Ah Boy and told SP3 to follow his car. SP3 followed the black Proton Wira PCR 4022. SP3 signalled SP4 and followed Ah Boy for about 100 meters before Ah Boy stopped by the roadside. SP3 stopped behind him. Ah Boy came out of his car with a white plastic bag P11, and sat beside SP3 in the latter's car. SP3 was still on line with SP4 in hands free mode. SP3 and Ah Boy spoke in Cantonese. Ah Boy opened the bag to show the pills and upon being requested SP3 opened his waist pouch to show the RM4,800.

[4] SP4 asked SP3 on the online connection whether he could strike, and SP3 replied he could. Ah Boy appeared anxious but SP3 prevented him from running away by holding on to his arm and collar. At that moment SP4 arrived and arrested Ah Boy. Other members of the ambush party with SP4 arrested the other two Chinese males in the black Proton Wira.

[5] Taking Ah Boy out of the car, SP4 conducted a body search. He found on him a Louis Vuitton sling bag P18 containing a wallet P19 with an identity card identifying him as the appellant Lee Gee Yong. The sling bag also contained two Nokia handphones P21 and P25 and one Motorola handphone P26. Nothing was found on the other two Chinese males Yeo Kah Fan and Kam

Mun Loong or in the black Proton Wira. They were all brought to the Kajang District Police Station. SP4 made a police report.

[6] At about 7pm, the investigating officer SP5 received from SP4 the police report, the appellant together with Yeoh Kah Fan and Kam Mun Loong, exhibits per P17. The exhibits were locked up by SP5, taken out the next morning 22 February 2009 at about 10am to be photographed before being locked up again.

[7] On 23 February 2009 at about 8.30am, the exhibits (bag marked A item A1–A97) were taken out and put into a marked envelope and sealed. The marked and sealed envelope was handed over to the chemist SP2 at about 10.12am the same morning. Satisfied the envelope and seal was in good condition, SP2 issued a receipt P8 to SP5 and locked up the envelope.

[8] SP2 analysed the 970 pills in A1–A97, ('the exhibit drugs') and found them to weigh 165.50g and contained 4.35g nimetazepam. He prepared a chemist's report P9 and returned the exhibits in the envelope and the chemist's report to SP5 on 25 March 2009 at about 4pm.

[9] At the end of the prosecution case, the High Court found that the prosecution had made out a prima facie case against the appellant under s 180(1) of the Criminal Procedure Code Act 593, and in accordance with sub-s (3) thereof called upon the appellant to enter upon his defence.

THE DEFENCE CASE

[10] Called to enter upon his defence, the appellant elected to give evidence on oath. He testified:

(a) the car PCR 4022 belonged to his wife;

(b) he often goes to work with the car; and

(c) on 21 February 2009, he together with Yeo Kah Fan and Kam Mun Loong had gone to a used car shop, and when they were about to return Yeo Kah Fan fell into a drain and twisted his leg. Yeo Kah Fan asked him to take him to meet a friend at the petrol station opposite Plaza Phoenix. The three of them went. On the way, Yeo Kah Fan called his friend and told the appellant to stop his car next to a gold coloured Gen2 car. Yeo Kah Fan then told him to drive forward and he stopped by the roadside when Yeo Kah Fan told him to do so. Then Yeo Kah Fan told him to take a white plastic bag P11 to give to his friend in the Gen2 which had stopped behind them.

[11] It is the appellant's case that he did not know what was in the bag P11. It was submitted he did not have it long enough to find out. When he reached the Gen2 he was asked to enter the car to sit by the driver who was still talking on the telephone. Then suddenly someone came, opened the car door, pointed a gun at him and told him to lie face down on the road.

FINDINGS ON THE APPEAL

[12] It is evident that the prosecution case is not based upon custody and control by the appellant of the exhibit drugs, but that the prosecution case of trafficking is founded upon the sale of the exhibit drugs by the appellant to the agent provocateur SP3 (see *Public Prosecutor v Md Rashid & Anor* [1997] 1 CLJ 235 (FC). The price, quantity, time and place for delivery and payment were settled. There was, therefore, in existence a sale and purchase transaction ready to be performed between SP3 and Ah Boy whom he had never met before. In *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197 (FC), it was settled by the Federal Court that a sale is therefore complete upon transfer of the property in the goods even though the price has not been paid.

[13] While the transaction with 'Ah Boy' was conducted on the handphones, the prosecution evidence showed that there were telephone calls made between the handphone used by SP3 and a handphone found in the Louis Vuitton bag slung on the body of the appellant. At the time SP3 saw the appellant sitting in the driver's seat of PCR 4022 holding a handphone, he received a telephone call from Ah Boy telling him to follow the car. It is also uncontroverted evidence that SP3 followed PCR 4022 and stopped behind it when the appellant stopped PCR 4022 by the roadside.

[14] Showing the pills in the bag offered for delivery and the availability of the money to pay completes the purchase. That the sale and purchase was interrupted by the arrival of SP4. The interruption to the completion of the delivery and payment is by a third party and is not a change of mind by either one of the parties about the sale and purchase, ie SP3 or Ah Boy.

[15] The evidence of an agent provocateur is made admissible by s 40A of the Dangerous Drugs Act 1952 Act 234 which provides:

> (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law of the provisions of this Act or any other

written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[16] The section has been explained by the Federal Court in *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 4 CLJ 529 (FC) that Parliament has deemed it fit that evidence of an agent provocateur be admissible without any restrictions and the trial judge is no longer vested with a discretion to exclude such evidence. The cross-examination of SP3 did not produce any reason to doubt the testimony of SP3.

[17] The learned trial judge considered the question whether the appellant is the Ah Boy in the telephone conversation. He reasoned that because the arrangement to meet made between SP3 and Ah Boy on the telephone did take place as arranged, and together with the evidence that the telephone with the No 016-6228961 was found in the appellant's sling bag, the prosecution had made out a prima facie case that the appellant is the Ah Boy in the telephone transaction for the sale and delivery of the eramin Five pills made with SP3. The evidence of SP6 which remained unshaken, that the telephone P26 with the No 016-6228961 was used in calls between SP3 and the appellant, further supports the conclusion. We find no flaw in the reasoning.

[18] The learned trial judge did not overlook the fact although the agreed transaction was for 1,000 pills, what was found in the bag taken from the appellant contained 970 pills. We find no flaw in the reasoning that this does not throw a reasonable doubt whether the appellant was the Ah Boy with whom the sale and purchase transaction was made.

[19] We turn to the consideration by the learned trial judge of the case for the defence from para 15 onwards of the grounds of judgment.

[20] The appellant gave evidence on oath he had driven Yeo Kah Fan and Kam Mun Loong to the petrol station on the instruction of Yeo Kah Fan, and that it was Yeo Kah Fan who spoke on the telephone to SP3, and having moved and stopped on the roadside, it was Yeo Kah Fan who had told the appellant to take the white plastic bag to SP3 whose car had stopped behind PCR 4022.

[21] The learned trial judge considered the defence evidence against the whole of the evidence before concluding at para 21 of his grounds:

> Berdasarkan kepada keterangan-keterangan yang ada, mahkamah memutuskan bahawa pihak pendakwaan telahpun membuktikan kesnya melampaui keraguan yang munasabah terhadap OKT dan OKT telah gagal untuk menimbulkan sebarang keraguan yang munasabah … Pembelaan yang dikemukakan oleh OKT hanyalah penafian semata-mata dan juga jelas satu 'afterthought' dan pembelaan seperti ini tidak berupaya untuk membangkitkan apa-apa keraguan yang munasabah …

[22] We find, therefore, that the learned trial judge had directed his mind to the question he must address, that is whether the defence had raised a reasonable doubt, and to do so by measuring it against the whole of the evidence put before the court.

[23] We agree that the effect of the defence evidence is that the sale and purchase transaction was between SP3 and Yeo Kah Fan and not the appellant, and that Yeo Kah Fan is in fact Ah Boy. The learned judge did not err in finding that this defence was never put to any prosecution witness. All that was done was to put to SP3 and SP4 that the appellant was not Ah Boy. It was not put to SP3 and SP4 or even SP5 that at any time the appellant had told any of them that the exhibit drugs did not belong to him but to Yeo Kah Fan. If these prosecution witnesses were so told during investigation, the investigation could have been directed to Yeo Kah Fan or if the questions were put in cross-examination of SP3, SP4 or SP5, the prosecution could have called Yeo Kah Fan as a witness. Since the allegation against Yeo Kah Fan was not made to any prosecution witness, no adverse inference can be drawn by/from the not calling of either Yeo Kah Fan or Kam Mun Loong or both as a witness. These two friends were offered to the appellant who elected not to call them as witnesses.

[24] The defence that Yeo Kah Fan was Ah Boy and that it was he who spoke with SP3 over the telephone is also incapable of raising a reasonable doubt in the prosecution case for another reason: the testimony by SP3 that he saw the appellant speaking to him over the telephone while sitting in the driver's seat was never challenged. SP3 could not receive another call from another person on his telephone while the appellant was on the line, and at the same time he saw the appellant speaking to him.

[25] We are satisfied the learned trial judge had taken into consideration all the evidence before him including that of the defence and had not taken into

consideration matters he should not. We found no error of law, principle or finding of fact. Accordingly, we dismissed the appeal and confirm the conviction and sentence by the High Court.

Appeal dismissed and conviction and sentence of court below affirmed.

Reported by Afiq Mohamad Noor